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United States Policy Regarding Recognition of Foreign States

By RANDALL S. LEFF

Member of the Class of 1977.

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It is not by speculating on the abstract relations of ideal nations that men will bring more order and justice into the relations of State, it is by looking at the facts in their reality and seeking, without illusion, without passion, and without surrender the laws that govern them.¹

I. INTRODUCTION

RECOGNITION is the act whereby the Executive of a nation formally acknowledges the existence of a new state or government and determines that all of the legal consequences flowing from this act must operate. This unilateral action is a fundamental event of international law for it results in international rights and obligations upon the new entity. Profound consequences necessarily flow from this determination affecting development of normal relations, the prestige of the emerging states, access to potential revenue, and access to foreign legal systems. Notwithstanding the importance of recognition, the term has been confused with "normalization of diplomatic relations" and used with distressing imprecision by both lawyers and political theorists. It is therefore essential to develop a clear understanding of the nature and functions of recognition.

The United States was not always plagued with doctrinal inconsistencies regarding the nature and function of recognition. As the first Secretary of State, Thomas Jefferson maintained that recognitional decisions should be based not on the constitutional legitimacy of a government, but rather on its actual ability to exercise effective control over its territory and population.² These standards remained unchanged

1. C. VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 136 (P. Corbett trans. 1968) [hereinafter cited as VISSCHER].

2. Jefferson, the great revolutionary, once said, "I hold that a little revolution now and then is a good thing and is as necessary in the political world as storms in the physical . . . It is a medicine necessary for the sound health of government." J. GOEBEL, *THE RECOGNITION POLICY OF THE UNITED STATES* 100 (1915). Rebellion has been said to be the only true guarantee possessed by the people against bad government.

until the late nineteenth century. The so-called "Seward Doctrine"³ advocated in the post-Civil War reconstruction era, suggested a departure from the Jeffersonian focus upon *de facto* criteria controlling recognition. But no concrete action on this theory was taken until the failure of the United States to recognize the existence of the Union of Soviet Socialist Republics (USSR) during the 1920's. Since then, there has been substantial controversy over the proper function of recognition in international law.

The primary purpose of international law is to regulate the conduct of political entities in harmonious co-existence within a world community. Such a purpose cannot be achieved if one of the entities is free to liberate itself from the restraints of law with respect to the other entities by simply refusing to recognize them.⁴ Therefore, binding legal standards governing recognitional determination must be developed and applied.

This note will propose that recognition be fundamentally premised upon international legal standards rather than political considerations. In addressing this issue, the note will initially analyze the theoretical and historical foundations of the concept of recognition. The inconsistencies of the United States and British positions will be considered in order to demonstrate the importance of developing a new recognitional policy. In conclusion, the note will discuss whether there is a duty to recognize and the factors that may trigger or limit such an obligation.

II. FOUNDATIONS OF MODERN RECOGNITIONAL CONCEPTS

A. Origins

1. *Development of the Sovereign System.*

International law has evolved from a system of consensual relationships among autonomous sovereigns into a balance between contractual theories and a superimposed international legal order. The concept of state sovereignty is the foundation of all traditional notions of international law. Since the creation of the United Nations, international organizations and conventions have had more influence on the international legal order. However, since no multilateral treaty or conven-

3. See *infra*, note 47 and accompanying text.

4. T. CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 3 (1951) [hereinafter cited as CHEN].

tion governs recognition of foreign states, the standards controlling recognition must necessarily be gleaned from traditional concepts of international law as modified by recent United Nations imposed obligations.⁵ It is therefore helpful to trace the historical development of the concept of state sovereignty and its relationship to international law before analyzing recognitional concepts.

There was no international law until the breakdown of the medieval *respublica christiana* of the Middle Ages in the early sixteenth and seventeenth centuries. Before the Reformation the will of the state lacked any sovereign character. The state was regarded as inherently limited by the laws of God and nature; any enactment of the state contrary to those laws was inherently void. Western Europe was a single Christian brotherhood where men, not states, were the essential units.⁶

A system of independent sovereign states was initially established in 1648 by the Treaty of Westphalia.⁷ This treaty acknowledged the independence of Switzerland, the Netherlands, and the German Reich, and accorded the Protestant states equal standing with the Catholic states. This multilateral acknowledgment of the independence of individual state governments heralded the beginning of the sovereign system and the demise of the Holy Roman Empire. As a system of independent legal entities replaced the legal order of the Empire, the foundations of an international legal system developed.

2. *Positive International Law.*

Positive international law is the law applied in the relations of states which is made binding solely by reason of the obligatory character that the parties recognize in it. This concept of law is based in the system of absolute state sovereignty.

After the demise of the Holy Roman Empire, there was no binding international legal order to supervise relations among states. In the absence of this overseeing power, certain rules of conduct were needed to enable states equally sovereign to deal with one another. The rules that were developed constituted the "law of nations." Notwithstanding the fact that the "law of nations" was the root of modern inter-

5. See U.N. Doc. A/5763 (1964); U.N. Doc. A/AC 119/SR. 9 (1964); U.N. Doc. A/AC 119 SR 116 (1964).

6. L. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS 82 (1933) [hereinafter cited as JAFFE].

7. Treaty of Westphalia (Oct. 24, 1648) I THE CONSOLIDATED TREATY SERIES 319-56 (C. Parry comp. 1969).

national law, the law that developed during this period was nothing more than a formalized code of diplomatic conduct: the self-imposed morality of nations dealing with one another if, when and in the manner they chose. The primary purpose of the system was protection against intervention into the internal politics of one sovereign by another, manifested in the formalities of international relations: the code of diplomatic conduct and the ceremonial rules and practices of diplomatic intercourse.⁸

During the nineteenth century the consensual "law of nations" evolved into a positivist theory of international law. Under this theory, a state is bound by international law only to the extent that it has contracted with other states to be so bound.⁹ Despite the shift from the purely consensual to the contractual basis of international law, the foundation of the international legal system remained a body of law derived from the agreement of sovereigns.

The notion of sovereignty, and its control over international law, has been attacked both historically and analytically by modern international scholars. The concept of sovereignty established by the Treaty of Westphalia was intended solely to explain a state's internal power structure; it was not intended to govern relations among states. As the term "sovereign" evolved it became synonymous with "the law," since the sovereign had absolute authority over all relations within its realm. However, when the positivist theorists attempted to assert the contractual authority of the sovereign as the sole binding force in international law, the doctrine lost its meaning: while it provides an excellent justification for the binding force of treaties, positivism leaves completely unexplained the obligatory nature of the basic substance of international relations — customary norms and practices.¹⁰ Moreover, if international law is purely consensual then a state has not only the right to give consent, but also the right to withhold or withdraw it at will. Certainly a law which a subject can take up or put down to suit his convenience is not a law in any true sense.¹¹

8. M. KAPLAN & N. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 120 (1961). [hereinafter cited as KAPLAN & KATZENBACH].

9. See generally I L. OPPENHEIM, *INTERNATIONAL LAW* 125 (8th ed. 1955). [hereinafter cited as OPPENHEIM]; I D. ANZILOTTI, *COURS DE DROIT INTERNATIONAL* 44-48 (1929); Kelsen, *Recognition in International Law, Theoretical Observations*, 35 AM. J. INT'L L. 210 (1941). This position was first propounded by George Friedrich von Martens in *ESSAY ON THE EXISTENCE OF A POSITIVE EUROPEAN LAW OF NATIONS AND THE ADVANTAGE OF THIS SCIENCE* (1787).

10. Kunz, *The Meaning and Range of the Norm 'Pacta Sunt Servanda'*, 39 AM. J. INT'L L. 180, 181 (1945) [hereinafter cited as Kunz].

11. J. WILLIAMS, *ASPECTS OF MODERN INTERNATIONAL LAW* 62 (1939).

In actual practice, positivism can exist as only one of several elements in the formulation of recognition policy. As Professor J. Brierly stated:

only a very gloomy pessimist would fail to recognize that common moral and cultural standards do exist internationally, that they influence conduct between nations and that this community of sentiment, imperfect though it is, affords some basis for law.¹²

These customary international standards and obligations did not develop in a natural law vacuum. The consent of states has been instrumental in the creation of international law; indeed, it is impossible to impose any legal obligation on a state without its consent.¹³ Therefore, international law remains a balance between positivism and the conception of a superimposed international legal order.¹⁴ Professor T. C. Chen alludes to this balance in *The International Law of Recognition*:

In the last analysis, the question of international recognition is but a reflection of the fundamental cleavage between those who regard the State as the ultimate source of international rights and duties and those who regard it as being under a system of law which determines its rights and duties under that law.¹⁵

B. Doctrinal Distinction Regarding the Nature and Function of Recognition

The cleavage between the positivism and the concept of a super-

12. J. BRIERLY, *THE LAW OF NATIONS* 35 (2d. ed. 1942) [hereinafter cited as BRIERLY]. In the fourth edition of Professor Brierly's book, he points out that "some . . . nations . . . are inclined to look on international law as an alien system which the western nations . . . are trying to impose upon them." In effect, "these nations have begun to claim the right to select from among its rules only those which suit their interests or which arise out of agreements to which they themselves have been parties . . ." *Id.* at 44. See generally I.C.J. STAT. art. 38.

13. CHEN, *supra* note 4, at 19-21.

14. Theorists from the sociological school of international law maintain that the dichotomy between positivist and natural law concepts is balanced by "social solidarity." George Scali maintained that the laws of societal development comprise the basis of "objective law" (*droit objectif*) in the juridical sense. He wrote "[t]he validity of positive law is based upon conformity to the 'laws of causality' of the existence of society. This primary legal basis we call objective law because it cannot contain any subjective element . . ." By 1948, Professor Scali had limited his position to a certain extent in the *Cours de Droit International Public*. In this work, he did not mention that the laws of causality are laws in the juridical sense; he mentioned rather, that a material source of law is the "legal potential" of society which corresponds to "social necessity." Norms of law arise from this material source. International law, he asserts, can be explained only in proceeding from the social factors of international life, which themselves are the result of the "laws of causality." See generally Scali, *Essai sur les sources formelles du droit international*, RECUEIL D'ETUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANCOIS GENY, III, 400-401; G. SCALI, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 9 (Paris: Editions Pomat-Montchretien, (1948); G. TUNKIN, *THEORY OF INTERNATIONAL LAW*, 230-231 (W. Butler trans. 1974).

15. *Id.* at 3.

imposed international legal order is manifested in divergent doctrines on the function of recognition. None of these doctrinal distinctions has been expressly adopted by any nation but all have had an impact on the actual policies on recognition. Hence, an understanding of the basic concepts underlying these doctrinal concepts is essential to the formulation of any recognitional policy.

1. *The Orthodox Constitutive Theory.*

The constitutive theory acknowledges that nations, as sociological units, enter ipso facto into the general community of states, with or without recognition; but the act of recognition alone brings the nascent entity within a *judicial* community of states.¹⁶ Constitutive theory extends positivism to the field of recognition since it stresses the consensual nature of international law. The past popularity of the constitutive theory was the direct result of the vogue of the concept of State sovereignty.¹⁷ Hegel first outlined constitutive theory in *Enzyklöpadie der Philophisehen Wissenschaften*, when he asserted that states enter into legal relations with one another in conformity with their own will only by virtue of the act of recognition; before recognition no legally cognizable relations can exist between them.¹⁸ Oppenheimer clarified the relationship between constitutive theory and the older "law of nations" concept in his *Law of Nations*:

As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not imply membership of the Family of Nations. Those States which are members are either original members because the Law of Nations grew up gradually between them through custom and treaties, or they are members as having been recognized by the body of members already in existence when they were born. A State is, and becomes an International Person through recognition only and exclusively.¹⁹

The constitutive theory gained widespread acceptance prior to the twentieth century because no effective international organization governed international relations; hence, rights and duties between two entities could arise only as a result of mutual recognition of legal personality.²⁰

16. OPPENHEIM, *supra* note 9 at 144; A. PAVITHRAN, SUBSTANCE OF PUBLIC INTERNATIONAL LAW 161 (1965) [hereinafter cited as PAVITHRAN].

17. CHEN, *supra* note 4, at 18.

18. G. W. HEGEL, ENZYKLOPADIE DER PHILOSOPHSCHEN WISSENSCHAFTEN §§ 331 and 547 (Rosenkranz trans. 1870).

19. OPPENHEIM, *supra* note 9, at 125.

20. PAVITHRAN, *supra* note 16, at 160.

Examples of the application of a constitutive act of recognition are rare in international practice since few states or groups of states have such power that they can prompt the establishment of new states. Neither have they, through recognition, non-recognition or enforcement through intervention, the means of permitting or refusing new States or regimes to be formed.²¹ Libya, established under the Italian Peace Treaty of 1947²² by the General Assembly of the United Nations, is one recent example of the application of the theory.

Notwithstanding occasional resort to the constitutive theory, it has many ethical and logical shortcomings. The cardinal defect of the orthodox constitutive position is that the act creating statehood is one of unfettered political will, divorced from binding considerations of legal principle. It is this negation of legal obligation and assertion of the state's right to full freedom of action in recognition which has identified the constitutive view with the extreme assertion of sovereignty and so opened it to attack.²³ This defect, combined with the notion that recognition alone constitutes statehood, gives international relations the appearance of a closed club with restricted membership.

Lauterpacht attempted to minimize the political aspects of recognition by propounding a modified constitutive theory, under which a duty to recognize arises when certain *de facto* criteria have been satisfied. Such a solution could resolve the major problem of the orthodox constitutive position. However, the practical problem of the status of an entity recognized by some States but not by others would remain. This problem could be overcome by establishing an international organization to oversee recognitional decisions. But, with the recent United States experiences in the United Nations, there may be substantial resistance among the major powers to yielding this traditional act of sovereignty to the discretion of an international tribunal.²⁴

21. Scali, *U.S. Position at the 29th United Nations General Assembly*, THE UNITED STATES STATE DEPARTMENT REPORT (1974).

22. EVERYMAN'S UNITED NATIONS 161-62 (8th ed. 1968).

23. H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 41 (1948) [hereinafter cited as LAUTERPACHT].

24. On December 6, 1974, Ambassador John A. Scali, United States Representative to the United Nations, gave an address to the United Nations General Assembly on the role of the United Nations. He spoke of the "growing tendency" of the organization to adopt "one-sided, unrealistic resolutions that cannot be implemented" and of the Assembly's actions in seeking to "represent the views of the numerical majority of the day" rather than acting as a "spokesman of a more global opinion." Representative Scali's remarks illustrate the growing division between the United States and Third World countries as a result of the continuous adoption of one-sided resolutions. Press Release USUN-191 (1974), December 6, 1974; U.N. Doc. A/P.U. 2307, (1974) at 47-58; A. RAVINE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 15-16 (1974).

One of the most pressing moral problems with the constitutive approach involves the reorganization of existing states. Under present global conditions most new national entities will emerge from reorganizations of existing states. The foundation of a state on territory belonging to nobody — on *terra nullius* — is such a rare phenomenon that it can practically be ignored.²⁵ Under these conditions, it would seem unjust that a portion of humanity that once came under the protection of international law would suddenly be deprived of that protection merely because it has undergone reorganization.²⁶

These questions regarding the validity of the constitutive position reflect the schism that has developed during the nineteenth and twentieth centuries as a result of the transition from the sovereigns' "law of nations" to an international legal system dedicated to protecting the rights of both individuals and states.

2. *The Declaratory Theory.*

The declaratory theory of recognition developed primarily in opposition to the constitutive position. As one scholar noted:

Nowhere is the brand of positivism current in the science of international law more offensive than in its application to recognition of States. It elevates the arbitrary will of States to the authority of the source not only of particular rights, however fundamental, of States, but of their very rise and existence.²⁷

Under the declaratory theory, a state exists as a subject of international rights and duties as soon as it fulfills the conditions of statehood as defined in international law. Recognition merely declares the existence of the *de facto* situation.²⁸

The declaratory theory emerged as a natural outgrowth of the major revolutionary conflicts of the eighteenth and nineteenth centuries. When democratic nations replaced monarchical states, legal scholars questioned why the mere accident of prior, dissimilar exist-

25. BRIERLY, *supra* note 12, at 138.

26. In addition to these fundamental problems that question the nature and scope of the constitutive theory, there are also more theoretical questions that go directly to the basis of such a doctrine. One of the most frequent questions asked of constitutive scholars is: If the act of recognition is constitutive of statehood who recognizes the first state? Another, oft mentioned criticism of this doctrine is that if recognition is only binding among the parties, can it be forced to the absurd conclusion that states exist only in a relative sense? See generally LAUTERPACHT, *supra* note 23, at 55-58.

27. LAUTERPACHT, *supra* note 23, at 77.

28. *Id.* at 41.

ence should give states the right to call into being the full international personality of rising communities.²⁹ A leading declaratory scholar wrote:

States being the persons governed by international law, communities are subject to law . . . from the moment, and from the moment only, at which they acquire the marks of a State.³⁰

Professor Chen, one of the foremost modern proponents of the declaratory theory, sees the roots of this position in the concept of natural law which attributes fundamental rights and duties to states independent of their consent.³¹ At the turn of the nineteenth century, the declaratory theory was substantiated solely by reliance on natural law principles. However, present law of nations as manifested by international conventions and tribunals offers a substantial body of international law with which to buttress this proposition.³² Indeed, since signing of the Jay Treaty,³³ a significant number of international conventions have reflected the declaratory view. Moreover, many domestic courts and most international tribunals have taken "cognizance" of the rights inherent in an emerging entity.³⁴

Notwithstanding widespread acceptance of the declaratory theory, certain foundational questions are left unanswered, the most obvious of which concerns the function of recognition in international law. If the act of recognition is only a declaration of existing facts, then the decision to grant or withhold recognition may be a tautological exercise. Additionally, a right cannot flow from facts alone, except as prescribed by some legal system that declares which facts shall be determinative and finds certain facts to be true; conversely, all legal doctrine relates to specific factual situations.³⁵ In essence many declaratory scholars have been so concerned with divorcing recognition from polit-

29. *Id.* at 45.

30. W. HALL, A TREATISE ON INTERNATIONAL LAW 19-20 (A. Higgins ed. 1924).

31. CHEN, *supra* note 4, at 18-19; BRIERLY, *supra* note 12, at 609.

32. See generally U.N. CHARTER; U.N.Y.B. 1001 (1970); Statute of the International Court of Justice, U.N.Y.B. 1013 (1970); Vienna Convention on the Law of Treaties U.N. Doc. A/CONF. 39/27, at 289; Charter of Economic Rights and Duties of State, 14 INT'L LEG. MAT'LS 251 (1975).

33. Jay Treaty, I TREATIES 586 (1901).

34. See *Upright v. Mercury Business Machine*, 13 App. Div. 2d 36, 213 N.Y.S. 2d 417 (1961); *Wulfsohn v. Russian Socialist Federated Republic*, 234 N.Y. 372, 138 N.E. 24 (1923); *Underhill v. Hernandez*, 168 U.S. 250 (1897).

35. KAPLAN & KATZENBACH, *supra* note 8, at 110.

ical consideration that they have minimized or disregarded the legal function of and rights and duties flowing from, the act.³⁶

3. Conclusion.

The clear conclusion reached after examination of both recognition doctrines is that doctrinal distinctions will inevitably be abandoned in the field of recognition. The constitutive concept of the unrecognized state as a sociological rather than political entity has proven an inadequate and incomplete solution; this is especially true when a government has been effectively established and a state of permanence has been attained by the new entity.³⁷ Under similar scrutiny, the declaratory position appears to have swung too far in the opposite direction by overlooking the substantial role that recognition plays in international relations.³⁸

Assuming *arguendo* that recognition is a purely political act, the effect that it may have on the emerging state cannot be discounted. Recognition puts an end to an uncertain situation for the recognized state, and assures its political position among nations.³⁹ In addition, recognition is generally conclusive upon the internal organs of the recognizing state, in particular upon courts of those nations which adopt the doctrine of judicial self-limitation.⁴⁰ These substantial internal and international implications have been minimized by the de-

36. Brierly replies that recognition is a purely political rather than a legal act. See BRIERLY, *supra* note 12, at 100. Kunz asserts that the primary function of recognition is to establish normal diplomatic relations between states. See J. KUNZ, *DIE ANERKENNUNG DER STAATEN UND REGIERUNGEN IN VOLKERRECHT* 95 (1928), in LAUTERPACHT, *supra* note 23, at 42 n. 3. In contrast to these extremely limited views regarding the function of recognition, Nys and Pradier-Fodéré maintain that the act of recognition manifests a state's acceptance into the international community. Before recognition, the new entity possesses all of the rights which international law grants to a state, but it is only after recognition by the other state, that the nascent state is assured of enjoying these rights. See E. NYS, *LE DROIT INTERNATIONAL* 70 (1912); I PRADIER-FODÉRE, *TRAITÉ DE DROIT INTERNATIONAL* 237 (1885). In a similar vein, Erich reasons that recognition serves an evidentiary function in international law, *i.e.*, once a state recognizes a new entity, the recognizing state is henceforth bound by its declaration. See LAUTERPACHT, *supra* note 23, at 42. The most vehement reaction to the constitutive theory is manifest in Mexico's Estrada Doctrine. Under this doctrine, Mexico completely abandoned the concept of recognition and proclaimed: "[T]he granting of recognition being an insulting practice implying a judgment upon the internal affairs of foreign States, the Mexican Government . . . henceforth confines itself to the maintenance or the non-maintenance of diplomatic relations with foreign governments without pronouncement of judgment upon the legality of those governments." Jessup, *The Estrada Doctrine*, 25 AM. J. INT'L L. 719, 722 (1931).

37. See CHEN, *supra* note 4, at 77; LAUTERPACHT, *supra* note 23, at 52.

38. *Id.*

39. See VISSCHER, *supra* note 1, at 239.

40. See *infra*, note 77 and accompanying text to explain the doctrine of judicial self-determination.

claratory theorists. Moreover, there is a jurisprudential difficulty inherent in all declaratory theories. Legal personality is a creature of law, not of nature. Under a legal system, the fact of state existence, the key to declaratory recognition, may also turn out to be the very question at issue. For these reasons the most realistic approach to recognition is to abandon all doctrinal distinctions regarding its function and to adopt instead a more realistic evaluation of its practical effects with regard to the international legal implications.

C. Roots of United States Recognitional Policy

From the early days of statehood until the beginning of the twentieth century, the United States has steadfastly maintained a recognitional policy controlled by *de facto* criteria. The rule was first declared by Secretary of State Thomas Jefferson: "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the governed substantially declared."⁴¹ Jefferson wrote:

The right to choose their own government, is a right whereon the United States is founded, and must not be denied to other peoples. Whether the choice be king, convention, association, committee, president, or anything else should make no difference to foreign States so long as it represents the will of the nation.⁴²

By the nineteenth century the concept of not only a right but also a duty to recognize was implicit in United States policy, as highlighted by the controversy surrounding the establishment of Argentina in 1818-1823. In a letter dated April 20, 1818, Secretary of State John Quincy Adams wrote to the Minister to Spain:

None of the Revolutionary Governments has yet been formally acknowledged; but if that of Buenos Ayres should maintain the stability which it appears to have acquired since the Declaration of Independence of 9 July, 1816, it cannot be long before they will demand that acknowledgment of right — and however questionable that right may be now considered, it will deserve very seriously the consideration of the European Powers, as well as of the United States, how long that acknowledgment can be rightfully refused.⁴³

41. Letter from Thomas Jefferson to Governor Morris, American Minister at Paris, in I J. MOORE, *A DIGEST OF INTERNATIONAL LAW* 120 (1906) [hereinafter cited as MOORE].

42. *Id.*

43. I W. MANNING, *DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES CONCERNING THE INDEPENDENCE OF THE LATIN-AMERICAN NATIONS* 61 (pts. I-II) (1925) [hereinafter cited as MANNING].

In a communication addressed to President James Monroe on August 24, 1818, Secretary Adams expressed his views more definitively:

There is a stage in such contests when the parties struggling for independence have . . . a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when independence is established as a matter of fact so as to leave the chances of the opposite party to recover their dominion utterly desperate.⁴⁴

When Spain protested the United States' announcement of its intent to recognize the independence of the revolting provinces, Secretary Adams responded that the United States was constrained to yield

to an obligation of duty of the highest order, by recognizing as independent States, Nations which, after deliberately asserting their right to that character, have maintained and established it against all the resistance which had been or which could have been brought to oppose it.⁴⁵

Unlike the United States policy during the nineteenth century of according full recognition to all firmly established *de facto* governments, Great Britain maintained a distinction between *de facto* and *de jure* governments. This distinction arose as republican states and governments first emerged, in an era when monarchies were regarded as the only God-given form of government. Under these circumstances the monarchical states had to establish official relations with the government that actually controlled a specified territory, while still indicating disdain and indignation toward the republican regimes. "De facto" recognition therefore developed to indicate that the regime so recognized was the government in fact over a certain territory, although not a lawful "de jure" government. As the global political structure shifted from primarily monarchical to primarily republican, the *de facto* doctrine mirrored the shift and was utilized to "brand" revolutionary regimes. Under the modern version, any government which did not succeed by constitutional means was considered illegitimate.⁴⁶

The United States rejection of the British *de facto/de jure* distinction was reflected in the remarks of Secretary of State Martin Van Buren in 1829, when he declared, "So far as we are concerned, that which is the government *de facto* is equally so *de jure*."⁴⁷ A similar

44. MOORE, *supra* note 38, at 78.

45. MANNING, *supra* note 43 at 147.

46. KAPLAN & KATZENBACH, *supra* note 8, at 122.

47. MOORE, *supra* note 41, at 137.

stance was reiterated by President Franklin Pierce on May 15, 1856, in a message to Congress:

It is the established policy of the United States to recognize all governments, without question of their source or organization, or of the means by which the governing persons attain their power provided there be a government *de facto* accepted by the people of the country Their determination, whether it be by positive action or by ascertained acquiescence, is to us a sufficient warrant of the legitimacy of the new government.⁴⁸

The first hint of departure from the *de facto* policy was heard in the post-Civil War Reconstruction era. In response to British and French recognition of the Confederacy during the War, Secretary of State Seward declared in 1868:

The policy of the United States is settled upon the principle that revolutions in republican States ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanence.⁴⁹

Notwithstanding this radical departure from President Pierce's position of twelve years earlier, the Seward Doctrine was never actually utilized during the nineteenth century.⁵⁰

When the United States achieved a position of substantial military and economic strength at the turn of the twentieth century, it concomitantly abandoned traditional notions of international law. In 1903 while Panama was part of Columbia, Secretary of State John Hay signed a treaty with Columbia which provided that the United States would pay Columbia \$10 million dollars, plus \$250,000 per year for the use of the Canal Zone. The Columbian Legislature summarily rejected this treaty on the ground that the price was insufficient. Subsequently, on November 3, 1903, Panama revolted and proclaimed its independence. Columbian troops dispatched to put down the revolt found their way blocked by United States Marines sent to the scene by President Theodore Roosevelt. Three days later, the United States recognized the Republic of Panama, and less than two weeks after that, the United States signed the Hay-Bunau-Varilla Treaty authorizing construction of the Panama Canal by the United States. Later, President Roosevelt boasted that he "took" Panama.⁵¹ The taking of

48. *Id.* at 142.

49. I C. HYDE, *INTERNATIONAL LAW* 162 (1945).

50. CHEN, *supra* note 4, at 107.

51. See generally LAUTERPACHT, *supra* note 23, at 22.

Panama is a clear example of a major power using its physical strength ruthlessly to brush aside the legal rights of a smaller state. The United States later rejected a Columbian claim for arbitration over this matter, and declared that "questions of foreign policy and of the recognition or non-recognition of foreign states are of a purely political nature, and do not fall within the domain of judicial decision."⁵²

Although Seward's remarks foreshadowed the entry of the doctrine of legitimacy into the United States recognitional policy, such a position was not actually put into practice until the Wilsonian Era. An interim theory known as the "Tobar Doctrine" swept the Western Hemisphere at the turn of the twentieth century. Dr. Tobar, former foreign minister of Ecuador, advanced the proposition that governments that had risen to power through extra-constitutional means should not be recognized. In an attempt to discourage civil war and dictatorial rule, five Central American states agreed:

The Governments of the High Contracting Parties shall not recognize any other Government which may come into power in any of the five Republics as consequence of a coup d'etat, or of a revolution against the recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.⁵³

Although not a party to the initial treaty, the United States gave its resounding support.⁵⁴ The subsequently adopted Wilsonian recognitional policy was remarkably similar to the Tobar Doctrine, but extended to all the nations of the western hemisphere. Explaining his recognitional policy in 1913, President Wilson declared:

Cooperation is possible only when supported at every turn by the orderly processes of just government based upon law, not upon arbitrary or irregular force Just government rests always on the consent of the governed . . . disorder, personal intrigues and defiance of constitutional rights weaken and discredit government We can have no sympathy with those who seek to seize the power of government to advance their own personal interests or ambition [T]here can be no lasting or stable peace in such

52. *Id.* It is of interest to note that when, eleven years later, Secretary of State Bryan advocated before the United States Congress the adoption of a bill providing for granting compensation to Colombia, he referred to the action of the United States in 1903 as an instance of the exercise of the right of international eminent domain in the interest of the world. See C. CALLCOTT, *THE CARIBBEAN POLICY OF THE UNITED STATES* 383 (1942).

53. Additional Convention to the General Treaty of Peace and Amity, Sept. 17, 1907, art. 1, 2 A.J.I.L. 1908 Supp. p. 229.

54. I G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 186-7 (1940) [hereinafter cited as HACKWORTH].

circumstances. As friends, therefore, we shall prefer those who act in the interest of peace and honor, who protect private rights and respect the restraint of constitutional provision.⁵⁵

Under this policy, the United States steadfastly refused to recognize the regimes of the Chomorro Government of Nicaragua in 1925, the Tinoco Government of Costa Rica in 1917 and other revolutionary regimes in Honduras, Guatemala and Bolivia.⁵⁶ Throughout the twentieth century the doctrine of legitimacy of origin has been alternately applied and rejected by the United States. The elusive nature of "legitimacy" affords ample room for arbitrary-judgment; hence the doctrine has been repeatedly misused as a pretext for political bargaining.⁵⁷

The Huerta regime in Mexico illustrates this problem. After General Adolfo de la Huerta came to power in February of 1913, the American Ambassador reported to the United States Department of State that Mexico was secure, and that the Huerta Government took office "in accordance with the constitution and precedents."⁵⁸ The next day the Department determined that the government had been "legally" established but that recognition would not be extended until the new government settled certain outstanding questions between the two countries, particularly dealing with settlement of border claims and losses of United States property.⁵⁹ Although recognition was ostensibly refused because of constitutional illegitimacy, the actual structure of government was never seriously contested. Had the Huerta Government, legitimate or illegitimate, complied with United States demands it would unquestionably have been recognized.⁶⁰

The United States' failure to recognize the USSR provides a similar illustration. In 1920, the United States asserted that one of the primary reasons it refused to recognize the Soviet Government was that it denied self-determination to the Russian people, in violation of the principles of democracy.⁶¹ Two years later, Charles Evans Hughes, Secretary of State, proclaimed:

We recognize the right of revolution and we do not attempt to determine the internal concerns of other States But while a foreign regime may have securely established itself through the

55. *Id.* at 181.

56. *Id.* at 190, 226, 234, 255, 385.

57. See generally CHEN, *supra* note 4, at 115.

58. HACKWORTH, *supra* note 54, at 257.

59. *Id.* at 257-59.

60. See CHEN, *supra* note 4, at 115.

61. 3 UNITED STATES FOREIGN RELATIONS 466-68 (1920).

exercise of control and the submission of the people . . . there still remain other questions to be considered.⁶²

These "other questions to be considered" were not resolved until 1933, when the governments reached a settlement agreement regarding confiscated property.⁶³

As a result of the United States failure to recognize the USSR after the First World War, the concept of recognition sharply declined in importance. During this period many courts abandoned the precedents of judicial self-limitation and limited the effects of nonrecognition to sovereign relations.⁶⁴ Where private rights were involved, the courts abandoned the constraints of executive non-recognition and entertained cases on the merits, thus liberating private rights from the political considerations that manipulated the attitudes of governments.⁶⁵ By the 1930's recognition was generally acknowledged as a political rather than a legal act. The Convention of Montevideo, signed December 26, 1933 by the United States, Chile, the Dominican Republic and Guatemala provided that:

The political existence of the State is independent of recognition by other States

The recognition of a State merely signifies that the State which recognizes it accepts the personality of the other with all the rights and duties determined by international law.⁶⁶

The present United States recognition policy has failed to evidence respect for international legal standards and obligations. The United States Constitution vests sole charge over foreign relations in the federal government.⁶⁷ This position has been consistently maintained by judicial decisions.⁶⁸ The executive is the representative organ of the nation in foreign affairs, and therefore the President and Department of State control recognition policy, as most statesmen and writers

62. HACKWORTH, *supra* note 54, at 177-78.

63. On Nov. 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the *de jure* government of Russia. As an incident to that recognition the United States accepted an assignment (known as the Litvinov Assignment) of certain claims. See *Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics*, DEPT. OF STATE, E. ENVOP. T.S. No. i (1933) for the various documents pertaining to recognition.

64. See HACKWORTH, *supra*, note 54 at 302-04 and *Salimoff & Co. v. Standard Oil Co.* 262 N.Y. 220, 186 N.E. 679 (1933).

65. See VISSCHER, *supra* note 1, at 242.

66. Arts. 3 and 6, 28 A.J.I.L. 1936 Supp., p. 76.

67. U.S. CONST. art. I, §§ 8, 10; art. II, §§ 1-3.

68. See *e.g.*, *Zemel v. Rush*, 381 U.S. 1 (1965); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

agree is proper.⁶⁹ There have, of course, been attempts by the Congress to take a more active role in recognitional decisions, the most recent of which is embodied in Senate Resolution 205, adopted by the 91st Congress on September 25, 1969.

Resolved, that it is the sense of the Senate that when the United States recognizes a foreign government and exchanges diplomatic representatives with it this does not of itself imply that the United States approves of the form, ideology, or policy of that foreign government.⁷⁰

Senator Alan Cranston,⁷¹ one of the authors of the resolution, viewed the resolution thus:

There is a great deal of confusion about what U.S. recognition of a foreign government really means today. The original recognition policy established in the days of our republic when Jefferson served as Secretary of State was quite simple. We merely ascertained whether or not a government existed and whether it was capable of sustaining itself The evidence is overwhelming that withholding recognition from governments of which we disapprove, and with whom our relations are particularly hostile, has failed totally to advance our values or to achieve any other significant and enduring purpose.⁷²

The implication of this statement is that the Resolution was intended to resolve certain doubts created by present United States recognition policy and to establish a rationale for recognition based on factual rather than political considerations.

George Aldrich, acting legal advisor of the Department of State, outlined the Department's current policy in testimony before the Senate Foreign Relations Committee in 1969:

Since recognition is basically a political act, infused with many foreign policy considerations, it would be impossible to set forth a workable formula that would determine whether recognition would be granted in any particular case. The decision whether to extend recognition is made after weighing a number of considerations relevant to the basic question of whether recognition or non-recognition would better serve the foreign policy of the United States.⁷³

69. See generally CHEN, *supra* note 4, at 226-32.

70. Senate Resolution 219, *United States Recognition of Foreign Governments: Hearings on S. Res. 205 Before the Committee on Foreign Relations, 91st Cong., 1st Sess. 10* (1969) [hereinafter cited as *Hearings on S. Res. 205*]. The Resolution was adopted on September 25, 1969.

71. United States Senator from California.

72. *Hearings on S. Res. 205* at 233.

73. *Id.* at 9.

He later added, "I do not think we have at any time in history disassociated the decision to recognize or not to recognize from broader considerations of what is in the national interest."⁷⁴

Aldrich's statements regarding United States practice combined with his support of Senate Resolution 205 provide significant evidence of the interweaving of United States recognitional and foreign policy decisions. Aldrich perceived Senate Resolution 205 as a grant of unfettered political discretion rather than as an appeal to return to cognizable legal standards.

III. THE IMPORTANCE OF DEVELOPING A NEW RECOGNITIONAL POLICY

A. Different Levels of Acknowledgment Have Led to Inconsistent Results in Domestic Courts

There are presently three levels at which the United States acknowledges the existence of foreign states: cognition, cognizance, and recognition. The United States is obligated by international law to respect the territorial integrity of foreign states.⁷⁵ Cognition is an initial acknowledgment that an entity has exerted sufficient control over a territory such that interference with its territorial integrity would constitute a violation of international law. Thus when the United States takes cognition of the sovereignty of another entity it takes note of the existence of the other state, without making any affirmative declarations. But, until the fact of actual control over territory is noted, there is no cognition.⁷⁶

Cognizance is the act of some entity, other than the executive, acknowledging a *de facto* situation and allowing consequences to flow therefrom. In *M. Salimoff & Co. v. Standard Oil*,⁷⁷ Chief Justice Ezra Pound, writing for a unanimous Court of Appeals of New York, explained:

The courts may not recognize the Soviet Government as the *de jure* government until the State Department gives the word. They may, however, say that it is a government, maintaining internal

74. *Id.* at 10.

75. U.N.Y.B. 1013 (1970) at art. 2 § 4. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 107 (1965) [hereinafter cited as RESTATEMENT].

76. N. LEECH, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 768 (1973) [hereinafter cited as LEECH].

77. 262 N.Y. 227, 186 N.E. 679 (1933).

peace and order, providing for national defense and the general welfare, carrying on relations with our own government and others. To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country is to give to fictions an air of reality which they do not deserve.⁷⁸

The Court in *Salimoff* was constrained by the factual situation to abandon the doctrine of judicial self-limitation and to take cognizance of the officially unrecognized Soviet Government and allow legal consequences to flow therefrom. Full recognition, on the other hand, can only be extended by the Executive when he takes note of the existing facts and determines that all of the legal consequences of recognition must operate.⁷⁹

These three levels of acknowledgment have led to inconsistent results in domestic courts and to controversy over what consequences should flow from the act of cognition, or cognizance and recognition. Under the traditional English concept of judicial self-limitation, subject to certain exceptions, no judicial existence can be attributed to an unrecognized government and no legal consequences can flow from its purported factual existence.⁸⁰ United States courts reflected similar self-limitation until the late nineteenth century. But in 1897 the Supreme Court in *Underhill v. Hernandez*⁸¹ expressly recognized the sovereign immunity of an unrecognized State and held that "acts of legitimate warfare cannot be made the basis of individual liability."⁸² The Court reasoned that courts of one country should not sit in judgment on the acts of the government of another done within its own territory; and that this principle cannot be confined to lawful or recognized governments or to cases where redress can be had through public channels.⁸³ The *Underhill* reasoning was extended in *Wulfsohn v. Russian Socialist Federated Soviet Republic*,⁸⁴ where the New York Court of Appeals held that the unrecognized government of Soviet Russia would be granted sovereign immunity, thereby barring suit by a United States' plaintiff in an action for conversion of personal property within the territorial jurisdiction of the USSR.

More recently, in *Upright v. Mercury Business Machine Co.*,⁸⁵ a

78. 262 N.Y. at 234, 186 N.E. at 682.

79. LEECH, *supra* note 76, at 768.

80. See LAUTERPACHT, *supra* note 23, at 145.

81. 168 U.S. 250 (1897).

82. *Id.* at 252-53.

83. *Id.* at 255.

84. 234 N.Y. 372, 138 N.E. 24 (1923).

85. 13 App. Div. 2d 36, 213 N.Y.S. 2d 417 (1961).

United States plaintiff, as the assignee of a trade acceptance, sued an East German corporation. The defendant asserted in its first affirmative defense that as a creature of the unrecognized East German Government, the corporate entity could not be legally cognizable in the United States. The New York Supreme Court rejected this assertion:

A foreign government, although not recognized by the political arm of the United States Government, may nevertheless have de facto existence which is juridically cognizable. The acts of such a de facto government may affect private rights and obligations arising either as a result of activity in, or with persons or corporations within, the territory controlled by such de facto government. This is the traditional law.⁸⁶

Notwithstanding the bold stand that a few courts have assumed in taking cognizance of unrecognized states, most domestic courts have adhered to the traditional position and yielded to executive determination regarding acknowledgment of governments. Indeed, in 1923, the same year that the New York Court of Appeals extended sovereign immunity to the USSR in *Wulfsohn*, the same court held that the unrecognized Soviet Government lacked standing to sue in a United States court.⁸⁷ This position was recently followed by the same court in *In Re Estate of Luks*.⁸⁸ The question in *Luks* was whether certificates of conformity issued by consular official of the USSR in Latvia and Estonia were valid in a New York Surrogate Court. The court held that the powers of attorney filed in these matters were not valid because

the Government of the United States has never recognized the forceful occupation of Estonia and Latvia by the Union of Soviet Socialist Republics nor does it recognize the absorption and incorporation of Latvia and Estonia into the Union of Soviet Socialist Republics⁸⁹

Questions of recognition of governments lie exclusively within the realm of the executive branch of our government and our courts can give no effect to an act of an unrecognized government which either by implication or otherwise would indicate recognition of that government.⁹⁰

The problems inherent in a judicial system dependent on the executive branch's determinations of the status of unrecognized states

86. *Id.* at 46, 213 N.Y.S. 2d at 426.

87. *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. (1923).

88. 45 Misc. 2d 72, 256 N.Y.S. 2d 194 (Sup. Ct. 1965).

89. *Id.* at 74, 256 N.Y.S. 2d at 197.

90. *Id.* at 75, 256 N.Y.S. 2d at 198.

was illustrated recently in *Federal Republic of Germany v. Elicofon*.⁹¹ The Federal German Republic brought suit against a United States citizen in United States District Court to recover works of art allegedly stolen from the German State Museum during the American occupation in 1945. The Kunstsammlungen Zu Weimar (Weimar Art Collection), an entity existing under the German Democratic Republic, sought to intervene and also brought a separate suit against Elicofon.

The Department of Justice, on behalf of the Department of State, filed a "Suggestion of Interest" of the United States with the district court which indicated the following: 1) The United States Government does not recognize the East German Regime, 2) The United States Government recognizes the Federal Republic of Germany as the only German Government entitled to speak for Germany as representative of the German people in international affairs, and 3) The United States recognizes the Federal Republic of Germany as entitled in this litigation to represent the Weimar Museum as trustee of its interests. The District Court thereupon denied intervention, citing *Banco Nacional de Cuba v. Sabbatino*,⁹² and stating:

A decision by this Court permitting the German Democratic Republic to bring such a suit would be the equivalent of an assertion by the Court that it acknowledges the right of that government to represent the people of East Germany in international affairs. A determination of that kind would be inconsistent with the presidential denial of recognition to the German Democratic Republic and thus be an unconstitutional encroachment upon the power of the President.⁹³

The Second Circuit affirmed without analyzing the lower court opinion. While the case was on petition for a writ of certiorari, the Supreme Court invited the United States to express its views on the case. In a memorandum dated January 1974, Robert Bork, Solicitor General, withdrew his objection to the entertainment of *Kunstsammlungen's* claim, noting that "the relationship between the Federal Republic and the German Democratic Republic has undergone significant changes."⁹⁴ The Supreme Court denied the petitions for the writ of certiorari and

91. 358 F. Supp. 747 (E.D.N.Y. 1972), *affirmed sub. nom.*, *Kunstsammlungen Zu Weimar v. Federal Republic of Germany*, 478 F.2d 231 (2d. Cir. 1973). *cert. denied*, 415 U.S. 931 (1974), *rehearing denied*, 416 U.S. 952 (1974).

92. 376 U.S. 398 (1964).

93. 358 F. Supp. at 750.

94. A. ROVINE, U.S. DEP'T. OF STATE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 12-13 (1974).

rehearing, and vacated the judgment of the Court of Appeals.⁹⁵ On rehearing, the District Court concluded that lifting the bar to prosecution of the claim justified relief from the order denying intervention.⁹⁶

The *Kunstsammlungen* case is just one example of how the current recognitional policy necessarily yields unsatisfactory results in the judicial system due to its segregation of law from fact. This confusion can best be resolved by limiting the distinctions between cognition, cognizance and recognition, and by governing the policy by the *de facto* situation at hand.

B. The Importance of the United States Evidencing its Willingness to Uphold and Be Bound by International Law

Certainly the inconsistencies in the domestic judicial opinions caused by the current policy provide an ample justification for a re-vamping of recognitional practices. Another reason for supporting such a modification is the importance of indicating a willingness to uphold and be bound by international law. In granting or refusing recognition, the state administers international law; it does not perform a legally indifferent act of national policy. In this imperfectly developed international society, states are often called upon to fulfill a legal duty or assert a legal interest without responsibility to a higher authority.⁹⁷ Probably the main difference between the national and the international community lies not in the lack of objective law for testing the validity of acts, but rather in the lack of effective central authority to apply and enforce the law.⁹⁸ Sir John Fischer Williams once wrote:

Members of the Family of Nations, acting in the absence of a central authority, when they admit to membership, have a duty to act as in discharge of a duty to the Family and therefore upon some general principle, not in a merely selfish and arbitrary interest.⁹⁹

Contrary to Aldrich's assertion, there are clear and objective international legal standards which should control the United States recognitional decisions. It is only through self-interest that these standards become clouded. Since the act of recognition can, and does, have pro-

95. *Cert. denied*, 415 U.S. 931 (1974); *denying petition for rehearing*, 416 U.S. 952 (1974). The United States and the German Democratic Republic agreed to begin negotiations concerning the establishment of diplomatic relations, with exchange of notes. These notes were signed in Washington, D.C. on September 4, 1974, and entered into force on the same date. 25 U.S.T. 2597; T.I.A.S. 7937.

96. 14 INT'L LEGAL MATERIALS 806.

97. LAUTERPACHT, *supra* note 23, at 33.

98. CHEN, *supra* note 4, at 428.

99. LAUTERPACHT, *supra* note 24, at 61.

found consequences throughout the wide spectrum of international relations, world order mandates that the decision to recognize be based on defined principles rather than unrestrained power and politics.

C. Normalization of Diplomatic Relations

Recognition is indispensable to normalization of diplomatic relations. If contacts between nations will be voluminous or important, it may prove practical or necessary to establish an official channel of communications through diplomatic missions. A government may recognize another state or government without establishing diplomatic relations with it; on the other hand, diplomatic relations have never been established without recognition.¹⁰⁰ Absent establishment of a diplomatic mission in a foreign land diplomats there are not protected by the Vienna Convention on Diplomatic Relations.¹⁰¹

In many instances these legal effects of recognition are not as important to an emerging nation as the practical effects of being formally acknowledged by a major power. The mere act of recognition normally provides a stimulus to trade and travel and increases the prestige and stability of the recognized government. Recognition often extends the benefits of existing treaties, and provides access to state funds on deposit in foreign states. The prestige it lends helps establish the state's credit, thus making available private and national loans.

Throughout the past century the United States has repeatedly accorded recognition on conditional grounds, such as the settlement of property disputes. Whether this policy is called "conditional recognition" or "political blackmail," the practice is objectionable because it taints from the outset the atmosphere of international friendship which recognition is supposed to foster.¹⁰² As long as international law claims the name of law, it is impossible to concede that the primary aspect of international relations takes place outside the law and that it is, in its principal mode of manifestation, a matter of politics pure and simple.

100. RESTATEMENT, *supra* note 75, at § 98.

101. See generally Vienna Convention on Diplomatic Relations of April 18, 1961, 500 U.N.T.S. 95. The International Law Commission has prepared the Draft Articles on Special Missions. See the Report of the Commission in 62 AM. J. INT'L L. 244 (1968). The Commission has observed that the convention on diplomatic relations dealt only with permanent diplomatic missions and that "diplomatic relations between states also assumed other forms that might be placed under the heading of 'ad hoc diplomacy, covering itinerant envoys, diplomatic conferences and special missions sent to a state for limited purposes.'" *Id.* at 246. The draft provides personal inviolability of the persons of the representatives which is substantially similar to that provided under the Vienna Convention on Diplomatic Relations.

102. See CHEN, *supra* note 4, at 265-69.

Thus, any doctrine which professes to regard recognition as an act of courtesy or comity, the exercise of which may be jurally withheld, deprives international law of a permanent basis in nature, and fails to bring recognition within the sphere of jurisprudence. Only through the adoption of objective, *de facto* standards for recognition can the United States assure all of the nations of the world that it is going to fulfill its legal obligations and refrain from intervening in the domestic affairs of foreign states.

IV. THE DUTY TO RECOGNIZE

Recognizing a political community as a state declares that it fulfills the conditions of statehood as required by international law. Before recognition, such rights and obligations exist only insofar as they have been expressly conceded or legitimately asserted or are compelled under universal rules of humanity and justice.¹⁰³ Recognition, then, is an international duty, rather than an act of national policy independent of binding legal principle.

There is substantial precedent for imposing a duty to recognize in both United States and international jurisprudence. Presidents Jefferson, Adams and Monroe believed that when certain *de facto* criteria had been substantially met, a duty to recognize the emerging nation arose.¹⁰⁴ This position reflected the revolutionary origins of the United States. International theorists and scholars from Bluntschilli to Lauterpacht have expounded at length upon the importance of imposing a duty to recognize based on *de facto* criteria. Lauterpacht eloquently expressed his position:¹⁰⁵

The basis of any scientific theory of recognition must be the realization that there exists a law above States; that that law determines the conditions of statehood; that a society cannot exist without members; that those who compose it at any given time must, if there be no other competent organs, apply the law which defines the conditions of membership; and that full international personality is not a concession of grace on the part of existing States. But the law embodying these principles is not an automatic abstract rule; nor is it pure jurisprudential speculation. It has no reality until it has been applied by a competent organ acting in good faith and in the fulfillment of a duty; and it has no meaning unless, when thus applied, it is the indispensable condition for the rise of state-

103. LAUTERPACHT, *supra* note 23, at 6.

104. HACKWORTH, *supra* note 54, at 274-75, 284, 297, 299, 309, 311, 316, 318.

105. LAUTERPACHT, *supra* note 23.

hood as part of the international legal system. The legal character of recognition extricates the process of recognition from the arbitrariness of policy; its constitutive character liberates it from an equally disintegrating element of uncertainty and controversy.¹⁰⁶

Notwithstanding the importance of recognition, many modern scholars deny that there is a duty to recognize existing *de facto* governments, basing this stance on the normative rule of international law. This doctrine asserts that law confirms what under the pain of compulsion, is the "right" conduct. Law is not merely a generalization based on actual behavior, because its validity is unaffected by wrongful acts. On the other hand, while law is unaffected by its violation, its continuous and unpunished breach, ultimately affects the standard of "right." International law, being weak, is highly susceptible to the law-creating influence of facts. Unless it is to be a flexible code for malefactors, then, international law must steer a middle course between the law-creating influence of facts and imperviousness to individual acts of lawlessness.¹⁰⁷

Applying this reasoning to recognition, these scholars argue that the duty to recognize has been consistently disregarded and so has fallen victim to the law-creating influence of facts.¹⁰⁸ This position would remove recognition entirely from the ambit of international law; for any recognitional practice which does not impose a duty to recognize, upon fulfillment of certain *de facto* criteria, cannot be considered law at all. There is clear precedent under Presidents Jefferson and Monroe for imposing a duty to recognize *de facto* governments. This, combined with a desire to evidence willingness to be bound by international legal obligations should be sufficient to reassert the duty to recognize and save it from the law-creating influence of facts.

In the recent cases of the People's Republic of China and the German Democratic Republic, the United States has withheld recognition because it would be inconsistent with existing treaties.¹⁰⁹ When treaty provisions make recognition impossible, a state is obligated to refrain from all acts which would defeat the object and purpose of the treaty.¹¹⁰ However, under the traditional concept of *rebus sic stantibus*, a tacit condition attaches to all treaties that they shall cease to be oblig-

106. *Id.* at 76.

107. *Id.* at 47.

108. See generally *RESTATEMENT*, *supra* note 75, at § 99.

109. See generally *supra* note 91 and *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59 (N.D. Cal. 1952).

110. Vienna Convention on the Law of Treaties, art. 18, U.N. Doc. A/CONF. 3927 (1969) [hereinafter cited as *Vienna Convention on Treaties*].

atory as soon as the state of facts and conditions upon which they were founded changes substantially.¹¹¹ This concept was codified in Article 62 of the Vienna Convention on the Law of Treaties, of which the United States is signatory.¹¹² Therefore if treaty provisions preclude recognition these provisions will remain binding only so long as "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."¹¹³

A more difficult question is whether in certain situations, there is a duty *not* to recognize a government. As Lauterpacht states:

From the jurisprudential point of view the acceptance of the policy or of the obligation of non-recognition amounts to a vindication of the legal character of international law as against the "law creating effects of facts." In a society in which the enforcement of the law is precarious, there is a natural tendency to regard successful breaches of the law as a source of legal right. Non-recognition obviates that danger to a larger extent. It is the minimum of resistance which an insufficiently organized but law-abiding community offers to illegality; it is a continuous challenge to the legal wrong.¹¹⁴

Non-recognition is not in and of itself an effective sanction in the nature of punishment that bends the will of the wrongdoer by the overwhelming pressure of its immediate effects. It is, rather, as a symbolic gesture respecting the authority of international law by holding a legal situation in suspense pending a definite settlement, which may result either in the restoration of the *status quo ante*, or the adjustment of the law to the changed situation of fact.¹¹⁵

Although the act of non-recognition is not one of the most effective sanctions, it can have substantial effects. In a recent paper, Raymond G. O'Conner analyzed the use of non-recognition by the United States as a sanction in bilateral relations. O'Conner initially concluded that used as "a diplomatic weapon in waging the Cold War, non-recognition has not been an unqualified success."¹¹⁶ He determined, however, that:

111. OPPENHEIM, *supra* note 9, at 550.

112. See Vienna Convention on Treaties, *supra* note 110, at art. 62.

113. *Id.*

114. LAUTERPACHT, *supra* note 23, at 430-31.

115. See CHEN, *supra* note 4, at 441.

116. Paper entitled *The Sanction of Non-recognition as Practiced by the United States*, presented to the Conference on Peace and Research in History, American Historical Society, Washington, D.C. (1969).

The association of economic and technical assistances with diplomatic relations adds another dimension to the efficacy of nonrecognition as a sanction and may be more potent than trade and financial arrangements.¹¹⁷

O'Connor found this combination especially potent in Latin America:

The situation in the Western hemisphere has, in the past been somewhat unique, for the consequences of nonrecognition by the United States usually have been more severe than when the doctrine was applied to nations in Europe or Asia. The economy and general well-being of the Latin American countries have been so dependent on the "Colossus of the North" that the denial of the benefits of recognition could prove disastrous to a new regime . . . It is the consequences which flow from the denial of recognition that make it most effective as a sanction.¹¹⁸

While denial of recognition alone clearly would not force a wrongdoer to disgorge illegally obtained property or cease violating human rights, such a sanction particularly when applied by a large number of nations does serve notice on all states that violations of international law will not be disregarded. In addition, until the new government is recognized, the territory in dispute remains legally open to reconquest by the injured state.¹¹⁹

Once a duty of non-recognition is accepted, two fundamental questions arise: 1) Can a duty of non-recognition co-exist effectively with a *de facto* recognition policy?; and 2) Will non-recognition deprive international law of its factual basis? The solution to the problem of co-existence is not as difficult as it may initially appear. During recent years, the formation of the United Nations and the International Court of Justice has developed a vast body of international law that has subsequently been codified and interpreted.¹²⁰ Hence, international rights and obligations are more clearly defined today than they were prior to 1945. A policy could be developed whereby a presumptive duty to recognize would arise once certain *de facto* criteria are met. This

117. *Id.* at 6.

118. *Id.* at 14.

119. This is the view of the United States. See instructions of State Department with regard to the French occupation of the Ruhr, in which is outlined the rights and duties of foreign occupants in time of peace. HACKWORTH, *supra* note 2, at 146-48.

120. See generally U.N. CHARTER, U.N.Y.B. 1013 (1970); Charter of Economic Rights and Duties of States, 14 INT'L LEG. MAT'LS 251 (1975); International Covenant on Civil and Political Rights, U.N. Gen. Ass. Off. Rec., 21st Sess., Supp. No. 16 (A/6316) at 52; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, approved by resolution 2625, Oct. 24, 1970, U.N. Gen. Ass. Rec. 25th Sess., Supp. No. 28 (A/8028) at 121.

presumptive duty would be rebutted by clear proof of a violation of accepted international law. Thus, the duty to recognize would be triggered by specific *de facto* criteria, and the discretionary element of recognition would be limited to determination of whether there are sufficient facts to rebut the presumption. If so, a duty not to recognize would arise. The adoption of such a policy may be merely a change in form and not in substance. However, if legal standards are defined and strictly applied, the political focus of the current policy can be minimized.

The second problem, whether a duty not to recognize would deprive international law of its factual basis, is more difficult to resolve. Non-recognition, by its very nature, maintains a gap between law and fact, justified as an effort to vindicate law and to restore injured rights that would otherwise be lost. But this duty must necessarily expire when the act of non-recognition becomes merely *pro forma* and loses actual substance. Non-recognition must therefore be limited to a period in which it will be of both practical and legal consequence.

V. LEGALLY COGNIZABLE CRITERIA FOR RECOGNITION

When developing effective *de facto* criteria that will trigger the act of recognition, a distinction must be made between subjects of international law and the governments that represent them. A state cannot come into being without government; however, it may continue to exist as a legal subject although temporarily without a government competent to represent it. The converse is not true; if a state disappears as a legal subject, the government representing it cannot survive.¹²¹ When a new regime is recognized as the government of an existing state, rights and duties of the state remain as they existed at the time of the change; the state as a subject of law continues to exist though its form of government may have changed radically. However, when a new state is recognized, the question arises as to its rights and duties under international agreements, as distinguished from its rights and duties under international law.¹²²

Under present global conditions most new national entities will emerge within the territory of existing states. This, however, does not

121. Blix, *Contemporary Aspects of Recognition*, 2 ACADEMIE DE DROIT INTERNATIONAL: RECUEIL DES COURS 597-98 (1970) [hereinafter cited as Blix]; RESTATEMENT, *supra* note 75, at § 96.

122. RESTATEMENT, *supra* note 75, at § 94.

obviate the need for developing a policy for granting recognition to new international entities. New states may thus be established by division of existing states or by secession. There may be considerable controversy in the case of division where territorial control is claimed by both the old and new governments. Clear criteria based on legal principles rather than unfettered political discretion, can, however, provide a viable solution.

A. Criteria of Statehood

1. *Defined Territory.*

A state is a territorial political entity. Therefore, while certain non-territorial entities may exert substantial authority and power, they are not states. A modern illustration of such a situation is the Holy See. For centuries the Holy See yielded formidable political power throughout the world. Yet, until the establishment of Vatican City by Italy under the Latern Treaty of 1929,¹²³ there was no territory, and thus no state.¹²⁴

There is no minimum size of territory required for recognition of statehood, although recently the United Nations has been somewhat reluctant to admit "mini-states" into membership. This reluctance is due, however, to doubt of the emerging states' abilities to carry the full burdens of United Nations membership, rather than doubt of their legal capacity as states.¹²⁵ Moreover, the General Assembly has consistently maintained that the representation of a state in the United Nations has no bearing on the individual relations of members with the states admitted or rejected pursuant to United Nations' collective decision.¹²⁶

The fact that the borders of the new state have not been clearly defined is no impediment to statehood. There must be some certainty about the existence of *some* territorial base for the state, but clearly delineated frontiers need not be established.¹²⁷

2. *Independent Government.*

A government must exist that is actually independent of that of

123. J. WHEELER-BENNETT, *DOCUMENTS ON INTERNATIONAL AFFAIRS* 225 (1929).

124. See Cumbo, *The Holy See and International Law*, 2 INT'L L. D. 603 (1948).

125. Blix, *supra* note 121, at 632-33.

126. VISSCHER, *supra* note 1, at 238.

127. See statement concerning Israel by Mr. Jessup, Representative of the United States to The Security Council of the United Nations, recorded in the U.N., S.C. OR., 3rd year, No. 128, 383rd meeting, 2 Dec. 1948, at 9. Quoted in H. BRUCCS, *THE LAW OF NATIONS* 71 (2d ed. 1953).

any other state, including the "parent" state.¹²⁸ The source of all rights and duties of an entity in international law is its actual supremacy within its territory over a specified portion of humanity, which enables it to exert physical pressure on all those who may disregard its rights.¹²⁹ States outside this territory must look to the organ which administers the responsibilities of statehood. A government is essential for this purpose. If such organization is absent it is meaningless for the outside world to attribute rights and obligations to the population of a state.¹³⁰

The independence must be actual and not merely formal. In the event that an entity does not exercise plenary power over its population or over international relations, it is far more practical for other states to deal with the government that does in fact exercise authority. The requirement of independence has in the past drawn political considerations into recognitional determination. However, this requirement is essential to any notion of sovereignty. Therefore, a serious attempt must be made to evaluate this element on *de facto* rather than political grounds.¹³¹

3. *Stability.*

The emerging entity must have a sufficient degree of internal stability to insure the habitual obedience of its population.¹³² The rationale behind this requirement is obvious: an unstable entity will not be viable nor able to fulfill the obligations that it assumes.

Several elements should be considered in determining if there is adequate stability to justify recognition. These elements include: 1) the orderly transfer of power from the parent country to the emerging state; 2) the absence of external threats; and 3) the internal stability of the nascent state. The third element raises the question of what evidence of internal stability will be required for recognition. The United States standards have fluctuated. At various times policymakers have looked to the popular support of the governed,¹³³ to the control over a substantial part of the territory of the country without serious popular opposition,¹³⁴ and to the general acquiescence of the population.¹³⁵ Clearly, popular support is not presently the standard for sta-

128. RESTATEMENT, *supra* note 75, at §§ 4, 100; LAUTERPACHT, *supra* note 23, at 26.

129. CHEN, *supra* note 4, at 3.

130. Blix, *supra* note 121, at 633.

131. *Id.* at 633-34.

132. See generally LAUTERPACHT, *supra* note 23, at 28.

133. See generally HACKWORTH, *supra* note 54, at 181-87.

134. See generally B. BOT, NON-RECOGNITION AND TREATY RELATIONS 22-25 (1968).

135. UNITED STATES FOREIGN RELATIONS 100 (1913).

bility. A government upheld by means of arms and terror may raise a presumption of instability; however, such a presumption may be rebutted by clear evidence to the contrary. Modern states can indeed be born and sustained by force, and stability can exist even in these situations.¹³⁶ Such stability alone, however, does not trigger the duty to recognize. The question of stability must be distinguished from the duty to recognize or not to recognize, with independent criteria for each. A merger of the latter two criteria, that is, control over territory without opposition and general acquiescence, has recently been articulated by the Department of State. As George Aldrich explained:

I think our present policy is more concerned with the acquiescence rather than the declaration of the will of the people. I think that what we have done in recent years shows a far greater concern with deciding whether the particular government involved has effective control and is not sitting on top of an imminent revolution, but does in fact govern with the acquiescence of the people. We have not generally concerned ourselves with asking, would the people, if given a free plebiscite, endorse that change of government.¹³⁷

This standard, if applied in fact, would prove effective in determining whether an emerging state has the requisite degree of stability to assume the international obligations of statehood.

B. Criteria for Recognition of Governments

Recognition of a government, as distinguished from recognition of a state, occurs only when an abnormal change of government is involved.¹³⁸ It is a fundamental rule of international law that every independent state is entitled to be represented by the government which the majority of the population habitually obeys, and which exercises effective control within its territory.¹³⁹ Hence, the international personality of a state is not altered by a non-revolutionary transformation in government. However, when there is a revolutionary transition, the recognizing state must determine whether the new government can maintain effective authority within its territory, with a reasonable prospect of stability.

The standards for recognition of a government are virtually identical with those for recognition of a state: independence, effectiveness of power, and reasonable prospects of stability and permanence. One

136. Blix, *supra* note 121, at 636.

137. *Hearings on S. Res. 205*, at 10.

138. See generally LAUTERPACHT, *supra* note 23, at 87.

139. RESTATEMENT, *supra* note 75, at §§ 100, 101.

minor distinction in these criteria between recognition of states and of governments is that under traditional concepts of international law the established government is favored by a presumption of competence so long as it offers the revolutionary movement "resistance which is not ostensibly hopeless or purely nominal."¹⁴⁰ Thus a revolutionary government replacing an established government will have a more difficult burden than will the government of a newly emerging state. This traditional presumption of competence appears at first blush to be a carryover from the "Law of Nations" in its effort to maintain the status quo. The presumption is necessary, however, as a protection against premature recognition. As Lauterpacht explained:

If States could proceed in this matter regardless of what is now a well-established legal principle, the result might be that in case of a civil war in a foreign country or, for that matter, even before actual hostilities have taken place there on a large scale, there would be nothing to prevent any State so minded from withdrawing recognition from the established government and transferring it to the rebellious party, with all the far reaching consequences of the change thus affected in the legal position. The result, in international law, would be to reduce the established government to the status of a rebellious group and to raise the newly recognized authority to the position of the legitimate government to which support and encouragement may lawfully be given.¹⁴¹

Indeed, the stability required in international relations would suffer if the recognized government shifted according to the vicissitudes of a civil war. However, this seemingly sound presumption must be applied circumspectly, to avoid maintaining a legal situation which is wholly contrary to fact.¹⁴²

Insofar as the exercise of international rights is concerned a recognized state with an unrecognized government is in no better position than a wholly unrecognized state. Recognition, of state or of government, is fundamentally the ascertainment of the real source of power, or, the locus of competent government within a body politic; and as such must be based solely on legal and factual criteria.

VI. CONCLUSION

The charter of the United Nations encourages the progressive development of international law.¹⁴³ Under modern notions of international

140. LAUTERPACHT, *supra* note 23, at 94.

141. *Id.*

142. See generally CHEN, *supra* note 4, at 104.

143. See U.N.Y.B. 1013 (1970), art. 13.

law there is a legal duty, as well as a moral obligation, to recognize emerging states once certain legal criteria have been satisfied. This note has traced the foundations of these legal obligations, emphasized the importance of adherence to the doctrine and provided criteria to be utilized in formulating a binding recognitional policy.

In the past, the Department of State, through George Aldrich, has justified the politically based recognitional policy of the United States on the ground that there is no legal duty to recognize. There is, however, substantial precedent for imposing such a duty. The Carter administration has re-emphasized the importance of taking a leadership position in the struggle for the protection of international human rights, but it is inconsistent for the Executive to attempt to enforce rights guaranteed by international law, while denying the binding nature of such a fundamental aspect of that law as recognition.

In this year of transition, the President has a unique opportunity either to support the foundation of a binding international legal order, or to continue bantering legal terminology around as a camouflage for purely political considerations.

